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No. 86-142

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1986

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THE CITY OF MONTGOMERY;
EMORY FOLMAR, MAYOR; AND CHARLES SWINDALL,
*Petitioners,*

v.

LONNIE BENJAMIN; AND HAROLD HICKEN,
*Respondents.*

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## REPLY BRIEF FOR PETITIONERS

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The basic issue in this case, as framed by the petition and the Memorandum in Opposition recently filed by respondents, is both straightforward and important: whether the City of Montgomery may, consistently with the Constitution, require its police officers to testify voluntarily about investigations that they conduct as part of their official duties. In their Memorandum, respondents argue that the City may not impose that requirement, first, because the decisions of this Court in *Garrity v. New Jersey*, 385 U.S. 493 (1967), and subsequent cases prohibit it and, second, because it would treat employees differently from other witnesses seeking immunity. Neither argument is persuasive.

In our petition we discussed in some detail the reasons why the rule announced in *Garrity* does not apply, and

should not be extended, to cases in which assertion of the privilege against self-incrimination prevents an employee from doing the job that he was hired to do. See Petition at 7-17. In particular, we pointed out that the approach taken by the Eleventh Circuit gives no weight to the important interests of the City in having its police officers testify freely and openly about their investigations. See Petition at 14-17; 19-21.

To answer this contention, respondents take the position that *Garrity* and its progeny "strike the proper balance between an employer's right to have an employee perform his function and the employee's right not to incriminate himself." Mem. in Opp. at 2. The problem with this argument, however, is that neither *Garrity* nor any of the later cases involved "an employer's right to have an employee perform his function." See *Garrity v. New Jersey*, *supra*; *Uniformed Sanitation Men's Association v. Commissioner of Sanitation*, 392 U.S. 273 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). In each of those cases the governmental employer was seeking, not to have the employee (or contractor) carry out his assigned duties, but to have him answer questions about his own conduct as part of a specific criminal investigation into that conduct. Thus, in holding that the employees could not automatically be dismissed for failing to answer, the Court had no need to, and in our view clearly did not, establish a much broader rule that employees could also withhold testimony required as part of their jobs. Here, unlike those cases, the dismissal of respondents was not imposed as an ancillary "penalty" for impeding an investigation into their own conduct but, as the district court expressly found, for their "refusal . . . as investigating officers to testify to their investigative findings in a court of law." Pet. App. 15a.

Perhaps as a way to gloss over this difference, respondents also appear to suggest that a government has no

interest in "voluntary" as opposed to "involuntary and coerced" testimony from its employees. Mem. in Opp. at 3-4. Respondents thus argue that their position in refusing to testify willingly is, and should be, no different from that of any witness who agrees to testify only under a grant of immunity. But this argument simply begs the essential issue: whether a government has a right to require more of its police officers than it does of citizens generally. In *Kelley v. Johnson*, 425 U.S. 238 (1976), this Court upheld regulations governing the personal appearance of police officers, observing that the County had "in accordance with its well-established duty to keep the peace, placed myriad demands upon the members of the police force, duties which have no counterpart with respect to the public at large." *Id.* at 245. Likewise, we believe that the City of Montgomery can require its police officers to testify voluntarily about their investigations, or face dismissal for refusing to do so, even though it could not insist upon voluntary testimony from citizens generally or, indeed, upon voluntary testimony from its police officers outside the scope of their assigned duties. The Constitution does not give employees the right to accept the benefits of employment and yet disregard the legitimate obligations of their jobs.

Finally, respondents fall back upon the common assertion that the case involves "unusual facts." Mem. in Opp. at 4, quoting Pet. App. 2a. Quite apart from respondents' (and the court of appeals') silence about what facts are so unusual, this point seems particularly out of place in a case where respondents expressly reject the sort of fact-based balancing test used with regard to other constitutional rights. See Mem. in Opp. at 3 n.1. As we discussed in our petition, *id.* at 17-22, the now-accepted approach in cases involving a possible conflict between the interests of a governmental employer and a claim of individual rights is to examine whether the assertion of the rights will interfere with "the government's legitimate purpose in promot[ing] efficiency and integrity in the

discharge of official duties, and to mainta[in][ing] proper discipline in the public service." *Connick v. Myers*, 461 U.S. 138, 150-51 (1983). What is "unusual" about this case is that, unlike the district court, the court of appeals made no effort to undertake this inquiry. That failure merits the attention of this Court.

## CONCLUSION

For the reasons stated in the petition and in this reply brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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